United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ORIGINAL

74-2169

ELMER BERNSTEIN, CHARLES ALBERTINE, JEFF ALEXANDER, PAUL BEAVER, ALAN BERGMAN, MARILYN BERGMAN, BENNY CARTER, ALEXANDER COURAGE, LUCHIE DE JESUS, GEORGE DEL BARRIO, ROBERT DRASNIN, JACK ELLIOTT, RAY EVANS, PERCY FAITH, RALPH FERRARO, JERRY FIELDING, SIDNEY FINE, CHARLES FOX, JERRY FRIED, HERSCHEL BURKE GILBERT, NORMAN GIMBEL, ERNEST GOLD, WILLIAM GOLDENBERG, JOHN GREEN, DAVID GRUSIN, EARL HAGEN, ARTHUR HAMILTON, MARVIN HAMLISCH, RICHARD HAZARD, MAURICE JARRE, J.J. JOHNSON, QUINCY JONES, FRED KARLIN, IRWIN KOSTAL, TYLWYTH KYMRY, PHILLIP LAMBRO, MEL LEVEN, JAY LIVINGSTON, HENRY MANCINI, EDDY L. MANSON, RICHARD MARKOWITZ, GREIG MC RITCHIE, GILBERT MELLE, VIC MIZZY, JOSEPH MULLENDORE, LYN MURRAY, LARRY ORENSTEIN, JOHN PARKER, STUART PHILLIPS, ROBERT O. RAGLAND, DAVID RAKSIN, NELSON RIDDLE, DAVID ROSE, MILTON ROSEN, MILTON SHORTY ROGERS, GEORGE ROMANIS, LEONARD ROSENMAN, WALTER SCHARF, LALO SCHIFRIN, NATHAN SCOTT, BERT A. SHEFTER, RICHARD M. SHERMAN, ROBERT B. SHERMAN, LEO SHUKEN, FRED STEINER, MORTON STEVENS, JOHN ANDREW TARTAGLIA, DUANE TATRO, GEORGE C. TIPTON, DON WOLF, AL WOODBURY, ON BEHALF OF THEMSELVES, AND ALL OTHER PERSONS SIMILARLY SITUATED,

Appellants,

B

P/S

REPLY BRIEF OF APPELLANTS

(Cover Page 1)

Appeal Reproductions Inc., 217 Broadway, New York, N.Y. 10007
Tel: 233-6626

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-against-

UNIVERSAL PICTURES, INC., TWENTIETH CENTURY FOX FILM, INC. PARAMOUNT PICTURES CORPORATION, METRO-GOLDWYN-MAYER, INC., WARNER BROS. - SEVEN ARTS, INC., COLUMBIA PICTURES INDUSTRIES, INC., WALT DISNEY PRODUCTIONS, INC., UNITED ARTISTS CORPORATION, COLUMBIA BROADCASTING SYSTEM, INC., AMERICAN BROADCASTING COMPANIES, INC., NATIONAL BROADCASTING COMPANY, INC., TRANSAMERICA CORPORATION, GULF & WESTERN INDUSTRIES, INC., KINNEY SERVICES INC., MCA, INC. AND THE ASSOCIATION OF MOTION PICTURE AND TELEVISION PRODUCERS,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF APPELLANTS

BATTLE, FOWLER, LIDSTONE, JAFFIN, PIERCE & KHEEL
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AUTHORITIES CITED

REPLY BRIEF OF APPELLANTS

ARGUMENT

POINT I

THE PRODUCERS HAVE IGNORED THE ISSUE OF WHETHER THE COMPOSERS ARE INDEPENDENT CONTRACTORS OR EMPLOYEES

In their brief the producers (defendants-appellees) have side-stepped the pivotal issue presented on the appeal: viz., whether the composers (plaintiffs-appellants) are independent contractors or employees. The producers frame the issue as "whether the District Court was correct in deferring to the NLRB and dismissing the complaint where the facts alleged 'arguably' constitute an unfair labor practice."* But, if the composers are in fact independent contractors, the NLRB would be without jurisdiction.

In passing over the fundamental issue of the composers' work status, the producers seek to avoid the inevitable result of the application of the "right to control" test, uniformly adopted by the NLRB and the courts, to the facts of this case. Concomitantly, the import of the two NLRB cases -- American Broadcasting Co., 117 N.L.R.B. 13 (1957) and Alliance of Television Film Producers, Inc.,

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* Producers' Brief, p. 2.

21-RC-7995 (1963) -- which, applying that test, held that the composers were independent contractors, is ignored. No determination on a trial record to the contrary has ever been made by the NLRB or any court.

The 1955 certification (201a) so heavily relied upon by the producers was based upon a stipulation accepted by the Acting Regional Director of the NLRB without a hearing. The stipulation and in turn the unit certified excluded independent contractors. No finding that the composers were employees was ever made.

The producers seek to further obscure the critical work status issue by asserting that the "real issue is whether plaintiffs were members of a labor union and dealt collectively with defendants" (Producers' Brief, p. 28). However, §2(5) of the Act, 29 U.S.C. §152(5) defines a labor organization as "any organization of any kind ... in which employees participate..." (Emphasis added.) What the producers ignore is the fact that there can be no collective bargaining under the umbrella of the Act with respect to composers who are independent contractors. Accordingly, there can be no basis for the producers' contention that the "District Court merely had to find that CLGA might be a labor organization" (Producers' Brief, p. 29).

What the producers mean but are embarrassed to say is that the District Court might well have left to the NLRB the issue

of whether the composers are employees or independent contractors as they argued originally before Judge Brieant. Their current position is also inconsistent with (a) their refusal to accept the composers' invitation in the District Court to jointly submit the question to the NLRB, (b) their assertion to the Court of Appeals on the composers' application for a stay that Judge Brieant's determination of the composers' status as employees was res judicata, pretermitting NLRB consideration of the question and (c) their current position with the Regional Director and the NLRB that the pending petition for clarification of the unit should be dismissed summarily without any determination of the status of the composers. In fact eight of the fifteen producers succeeded in having that application dismissed on the ground that they had never had any collective relations with CLGA.* After arguing before Judge Brieant that the NLRB had primary and exclusive jurisdiction, the remaining seven appellee producers repeatedly sought (before the NLRB hearing officer, the Regional Director and the Board) the dismissal of the CLGA petition for unit clarification without a determination regarding the composers' work status. Denying the producers' last motion the Regional Director stated:

> a complete record should be made on the issue of the employee status of the individuals here involved so that the Board might consider on a complete record

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* Transamerica, United Artists, Warner, Gulf, MCA, NBC, CBS and ABC.

what action, if any, is appropriate to clarify the present impact or significance, if any, of its 1955 certification.*

The composers adhere to the position that the issue of their work status might have been and still can be profitably referred to the NLRB. This procedure, however, should not entail dismissal of the complaint, but rather the retention of jurisdiction by the antitrust court. The International Ass'n of Heat and Frost Insulators v. United Contractors Ass'n, 483 F.2d 384 (3d Cir. 1973) and Carpenters District Council v. United Contractors Ass'n of Ohio, 484 F.2d 119 (6th Cir. 1973) cases approving this procedure were not commented upon by the producers in their brief.

POINT II

THE DISTRICT COURT NEITHER FOUND NOR COULD IT FIND, WITHOUT A TRIAL, THAT THE COMPOSERS ARE ESTOPPED FROM ESTABLISHING THEIR STATUS AS INDEPENDENT CONTRACTORS

The producers, recognizing that they could not support the District Court's finding that the composers are employees without a trial have shifted from the simple contention that the

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* The full text of the Regional Director's opinion, communicated by telex message on December 13, 1974, is reproduced as an appendix hereto.

composers are employees* to the contention that the composers are equitably estopped from establishing their status as independent contractors. The contention that the District Court found an estoppel, based on the 1955 consent certification and subsequent CLGA relations with some of the appellee producers, is without foundation in the Court's opinions. Nevertheless, even if such a holding is assumed to have been made, it would be untenable for the following reasons:

1. Section 2(3) of the Act, 29 U.S.C. §152(3) expressly excludes independent contractors from its coverage. Accordingly, the Court cannot be without jurisdiction, nor, can estoppel be used to defeat the policy embodied in the antitrust laws. "For no more than private contract can estoppel be the means of successfully avoiding the requirements of legislation enacted for the protection of a public interest." Scott Paper Co. v. Marcalus Mfg. Co., 326 U.S. 249, 257 (1945); accord, Lear v. Adkins, 395 U.S. 653 (1969).

2. Perma Life Mufflers v. International Parts Corp., 392 U.S. 134 (1968) establishes that an antitrust complaint is not to be dismissed on pleadings merely because the defendant and the plaintiff were both parties to the agreement which plaintiff's

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* Memorandum in Opposition to Appellants' Motion for a Stay submitted by Phillips, Nizer, Benjamin, Krim & Ballon, p. 2.

complaint attacks. Moreover, the composers were not, strictly speaking, parties to the minimum basic agreements negotiated by the CLGA.

3. In addition, under Lawlor v. National Screen Service Corp., 349 U.S. 322 (1955), even a prior judgment would not preclude a claim as to subsequent antitrust violations. That case certainly applies to the period subsequent to the NLRB determinations that the composers were independent contractors and a fortiori to the period after the composers indicated to the producers that they were independent contractors.

4. Furthermore, the consent certification and the minimum basic agreements (250a, 273a and 313a) expressly excluded independent contractors as required by the Act.

5. Ten of the fifteen appellee producers were not parties to the consent certification; viz., Transamerica Corporation, ("Transamerica"), United Artists Corporation ("United Artists"), Warner Communications, Inc. ("Warner"), Walt Disney Productions, Inc. ("Disney"), Metro-Goldwyn-Mayer, Inc. ("MGM"), Gulf & Western Industries, Inc. ("Gulf"), MCA, Inc. ("MCA") National Broadcasting Company, Inc. ("NBC"), Columbia Broadcasting System, Inc. ("CBS") and American Broadcasting Companies, Inc. ("ABC").

6. Eight of the fifteen appellee producers* were neither parties to the consent certification nor to any contractual relationship with the CLGA. They so advised the Regional Director and on that basis obtained a dismissal as to them of the unit clarification proceeding now pending before the NLRB. They are therefore precluded from asserting an estoppel based on any relationship between the CLGA and other producers. Of these eight, CBS and MCA actually obtained determinations from the NLRB that the composers were independent contractors and not employees. See respectively, American Broadcasting Co., supra and Alliance of Television Film Producers, Inc., supra.

Moreover, "[i]t is an uncontroverted principle that one who asserts or claims an estoppel has the burden of proving it and of showing the grounds on which it rests." 28 Am.Jur.2d Estoppel and Waiver §146 (1966). That authority further states the hornbook law as follows (§147):

> In order to establish estoppel, the evidence must show that the person claiming it actually has been misled in reliance on the conduct of the person against whom estoppel is asserted, and has been prejudiced, injured, or damaged by the acts and conduct of, or attributable to, the party to be estopped. Furthermore, the party claiming the estoppel must show that he

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* Transamerica, United Artists, Warner, Gulf, MCA, NBC, CBS and ABC.

> himself exercised good faith and due diligence to ascertain the truth. Evidence is insufficient to establish an estoppel where the proof fails to show that the party claiming the estoppel relied upon alleged misrepresentations of the party sought to be estopped, and where, furthermore, under the circumstances, he knew, or ought to have known, the facts. Moreover, if the evidence discloses no conduct of the party sought to be estopped tantamount to actual or constructive fraud which induced the party seeking to establish estoppel to act, estoppel is not established. (Footnotes omitted.)

There can be no determination on the validity of an estoppel in this case without a trial disclosing all of the facts regarding reliance, the reasonableness of such reliance and the public interest. In summary, the District Court did not find, and without a trial could not have found, an estoppel sufficient to dismiss the entire complaint against all the defendants.

The rule referred to by the producers on page 27 of their brief to the effect that an "existing certification must be honored until lawfully rescinded," has no application to this case. The consent certification as well as the minimum basic agreements excluded independent contractors. Clearly, it could not be an unfair labor practice for the producers to refuse to bargain collectively with independent contractors; accordingly, estoppel is inapplicable as a matter of law.

Finally, the producers argue without any support in the record that the composers induced defendants to deal with them as

employees. Who induced whom is a question of fact requiring a trial.*

POINT III

THE PRODUCERS' CONTENTION THAT THE MINIMUM BASIC AGREEMENTS ARE IMMUNE FROM ANTITRUST ATTACK BEGS THE QUESTION

The producers assert in POINT II of their brief that the AMPTP-CLGA minimum basic agreements are immune from attack under the antitrust laws. This contention, however, assumes that the composers are employees and as such, simply begs the question at issue on this appeal.

CONCLUSION

The order of the District Court dismissing the complaint for lack of subject matter jurisdiction on the asserted ground that the composers are employees should be reversed.

Respectfully submitted,

BATTLE, FOWLER, LIDSTONE, JAFFIN,
PIERCE & KHEEL
Attorneys for Appellants

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* In fact, the composers contend that the producers induced them to stipulate to an election. Moreover, eight of the appellee producers were neither party to the stipulation nor any subsequent agreements with the CLGA.

APPENDIX

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ZCZC006 NEW YORK, N.Y. DEC 13
TLX 127053 BATTLE FSK NYK
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BT

RE: American Broadcasting Companies, et al Case No. 31-UC-58.

On December 3, 1974, the employers' in this proceeding filed a request for special permission to appeal certain rulings of the Hearing Officer and to submit a motion to withdraw the notice of hearing and dismiss the petition prior to the close of hearing. A similar motion was filed by the employers and others then party to these proceedings on October 10, 1974, and denied by the Regional Director as to the employers on November 4, 1974. On November 9, 19714 the employers filed with the Board a request for special permission to obtain a review of the Regional Director's order and for a stay of the hearing pending review. On November 19, 1974 the Board denied said request "...without prejudice to renew the issues contained therein at a later appropriate stage of this proceeding."

The emloyers maintain in their December 3, 1974 request and motion that this petition should be dismissed because of the existence of a question concerning representation. I note that the employers urged this same reason as one basis for their October 10, 1974 request to the Regional Director and to the Board in their November 9, 19714 request for review.

The only factual distinction present in the employer's instant request is that at the hearing herein on November 25, 1974 they withdrew recognition from the Guild and then and there refused to bargain further with the Guild in any unit until such time as it secured certification anew from the Board. The employers urged that withdrawal of recognition in the circumstances raises a question concerning representation and that further proceedings to clarify a unit in which there is no present recognition is unwarranted. Accordingly, the employers' move to dismiss this proceeding. The Guild contends that its 1955 certification which

is extant confuses the relationship between the parties. In this regard, I note that the parties have been before the Board on prior occasions contesting basically the same issue as is being litigated in this proceeding: whether the composers and lyricists are independent contractors or statutory employees. Those prior proceedings, long and costly to the Board and all parties, became moot before that issue was resolved. I also note that the Board's extant certification was, in part, the basis for a June 1974 ruling by the United States District Court that the Board had exclusive jurisdiction of the subject matter in a proceeding before that court.

Finally, I note that the Guild has not abandoned the composers and lyricists but has continued to represent them in a certain important matter which we have before determined to be a mandatory subject of bargaining, and counsel for the Guild represents that if the individuals involved are found by the Board to be employees, the Guild will continue to represent them for all purposes of collective bargaining. In these circumstances whether or not a true question concerning representation exists in this case is not without doubt, and the resolution of that very difficult issue is not one I elect to undertake by way of granting special permission to appeal. In all of the circumstances, and particularly the past history of this continuing dispute between the parties of the relevance, if any, of the Board's 1955 certification, it is the view and conclusion of the Regional Director that a complete record should be made on the issue of the employee status of the individuals here involved so that the Board might consider on a complete record what action, if any, is appropriate to clarify the present impact or significance, if any, of its 1955 certification. Based on the foregoing I hereby deny the employers' request for special permission to appeal the Hearing Officer's rulings.

Roger W. Boubeaux, Acting Regional Director
National Labor Relations Board, Region 31
Los Angles, Calif.

STATE OF NEW YORK
COUNTY OF NEW YORK

BERNELL JONES being duly sworn deposes and says: On January 10th, 1975 I served the within ~~record on appeal~~ brief ~~appendix~~ on Kravath Swaine & Moore ~~respondent~~ appellees by leaving ~~mailing~~ ~~three~~ two copies thereof at his office located at one Chase Manhattan Plaza New York, New York 10005 the attorneys for the Columbia Broadcasting Systems Inc

Bernell Jones

Sworn to before me this 10th day of January, 1975

Theresa Corless

THERESA CORLESS
Notary Public, State of New York
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Term Expires March 30, 1976

STATE OF NEW YORK
COUNTY OF NEW YORK

FRED LEIPER being duly sworn deposes and says: On January 10th, 1975 I served the within ~~record on appeal~~ brief ~~appendix~~ on Shea, Gould Climenko & Kramer ~~respondent~~ appellees by leaving ~~mailing~~ ~~three~~ two copies thereof at his office located at 330 Madison Avenue New York, New York 10017 the attorneys for the Metro-Goldwyn-Mayer Inc

Fred Leiper

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Theresa Corless

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Fred Leiper

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SERVICE OF 2 COPIES OF THE WITHIN

Reply Brief

IS HEREBY ADMITTED.

DATED: Jan. 10, 1975

Phillips, Nizer, Benjamin, Krim & Ballon

Attorney for Respts

STATE OF NEW YORK
COUNTY OF NEW YORK

BERNELL JONES being duly sworn deposes and says: On January 10th, 1975 I served the within ~~record on appeal~~ brief ~~appendix~~ on Simpson Thacher & Bartlett the attorneys for the ~~respondent~~ appellees by leaving ~~mailing~~ ~~three~~ two copies thereof at his office located at One Battery Park Plaza New York, New York 10004 Gulf & Western Ind., Paramount & Universal

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STATE OF NEW YORK
COUNTY OF NEW YORK

BERNELL Jones being duly sworn deposes and says: On January 10th, 1975 I served the within ~~record on appeal~~ brief ~~appendix~~ on Hawkins Delafield & Wood the attorneys for the ~~respondent~~ appellees by leaving ~~mailing~~ ~~three~~ two copies thereof at his office located at 67 Wall Street New York, New York 10005 American Broadcasting Co. Inc

Bernell Jones

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